

GENERAL ORDER NO. 2

CRIMINAL JUSTICE ACT PLAN

PLAN OF THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
PURSUANT TO THE CRIMINAL JUSTICE ACT OF 1964, AS AMENDED

Pursuant to the provisions of the Criminal Justice Act of 1964 (18 U.S.C. § 3006A) ("the Act"), as amended by the Criminal Justice Act Revision of 1986, and the Anti-Drug Abuse Act of 1988 (codified in part at section 848(q) of Title 21, United States Code), the judges of the United States District Court for the Northern District of California adopt the following amended plan for the adequate representation of any person otherwise financially unable to obtain adequate representation.

I. PROVISION OF REPRESENTATION

A. Circumstance.

Mandatory. Representation shall be provided for any financially eligible person who:

1. is charged with a felony or with a Class A misdemeanor;
2. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031.
3. is charged with a violation of probation or faces enlargement of a condition, extension, or other adverse change;

4. is under arrest, when such representation is required by law;

5. is entitled to appointment of counsel in parole proceedings;

6. is charged with a violation of supervised release or faces modification or enlargement of a condition, or extension or revocation of a term of supervised release;

7. is subject to a mental condition hearing under Chapter 313 of Title 18, United States Code;

8. is in custody as a material witness;

9. is seeking to set aside or vacate a death sentence under sections 2254 or 2255 of Title 28, United States Code;

10. is entitled to appointment of counsel in verification of consent proceedings to a transfer of an offender to or from the United States for the execution of a penal sentence under section 4109 of Title 18, United States Code;

11. is entitled to appointment of counsel under the sixth amendment to the Constitution or by statute, or faces loss of liberty in a case, and federal law requires the appointment of counsel.

Discretionary. Whenever a judge or magistrate-judge determines that the interests of justice so require, representation may be provided for any financially eligible person who:

1. is charged with a petty offense (Class B or C

misdemeanor, or an infraction) for which a sentence to confinement is authorized; or

2. is seeking relief, other than to set aside or vacate a death sentence, under sections 2241, 2254, or 2255 of Title 28, United States Code;

3. is charged with civil or criminal contempt who faces the loss of liberty;

4. has been called as a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;

5. is proposed by the United States Attorney for processing under a pretrial diversion program;

6. is held for international extradition under Chapter 209 of Title 18, United States Code.

Representation may also be furnished for financially eligible persons in ancillary matters appropriate to the proceedings pursuant to 18 U.S.C. § 3006A(c). In determining whether a matter is ancillary to the proceedings the court should consider whether the matter, or the issues of law or fact in the matter, arose from, or are the same as or closely related to, the facts and circumstances

surrounding the principal charge.

B. When Counsel Shall Be Provided. Counsel shall be provided to eligible persons as soon as feasible after they are taken into custody, when they appear before a judge or magistrate-judge, when they are formally charged or notified of charges if formal charges are sealed, or when a judge or magistrate-judge otherwise considers appointment of counsel appropriate under the Act, whichever occurs earliest. Appointment of counsel may be made retroactive to include representation furnished pursuant to this plan prior to appointment.

C. Number and Qualifications of Counsel.

1. Number. More than one attorney may be appointed in any case determined by the court to involve exceptional circumstances. The court shall appoint separate counsel for persons having interests that cannot be represented by the same counsel or when other good cause is shown. In a capital prosecution, at least two attorneys should be appointed for the defendant. Due to the complex, demanding and protracted nature of capital habeas proceedings, pursuant to the provisions of 21 U.S.C. § 848(q)(4)(B), a capital habeas petitioner is entitled to appointment of one or more qualified attorneys. Appointment of two attorneys is not presumed. The Selection Board for the Northern District of California initially will evaluate the appropriate number of counsel to be appointed in a capital habeas case and, considering all relevant factors, will make

a recommendation as to whether one or two attorneys should be appointed. The judge assigned to the case also may consider a motion for appointment of second counsel.

2. Qualifications. Except as provided by section 848(q)(7) of Title 21, United States Code, at least one attorney appointed in a capital case shall meet the qualification requirements set forth in sections 848(q)(5) and (6) of Title 21, United States Code. Pursuant to section 848(q)(7), the presiding judicial officer, for good cause, may appoint an attorney who may not qualify under sections 848(q)(5) and (6), but who has the background, knowledge, and experience necessary to represent the defendant properly in a capital case.

D. Eligibility for Representation.

1. Factfinding. The determination of eligibility for representation under the Act is a judicial function to be performed by a federal judge or magistrate-judge.

Relevant information bearing on financial eligibility must be provided by the person on a financial eligibility affidavit which shall be completed and executed before a judicial officer. Whenever a person who is entitled to representation under this Plan appears without counsel, the court shall advise the person of the right to be represented by counsel and that counsel will be appointed if the person is financially unable to afford adequate representation.

Unless the person waives representation by counsel, if the court finds, after review of the information submitted, that the person is financially unable to obtain counsel, the court shall appoint counsel pursuant to the procedure set forth in the Plan.

2. Disclosure of Change in Eligibility. If, at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with his or her representation, and the information is not protected as a privileged communication, counsel shall advise the court.

3. Partial Payment or Reimbursement. If at the time of appointment or at any time thereafter the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, or that funds are available for payment from or on behalf of a person furnished representation, the court shall take appropriate action, which may include terminating the appointment of counsel, ordering partial payment by the person furnished representation, or permitting assigned counsel to continue to represent the party with part or all of the cost of representation paid by the person furnished representation.

No appointed counsel may require, request, or accept any payment or promise of payment for representing a party, unless such payment is approved by order of the court.

If at any stage of the proceedings, including an appeal, the court finds that a person who previously did not have counsel appointed under the Act is financially unable to pay counsel whom he or she had retained, the court may appoint counsel as provided in the Act, and authorize such payment as therein provided, as the interests of justice may dictate.

The court, in the interests of justice, may substitute one appointed counsel for another at any stage of the proceedings.

E. Continuity and Duration of Appointment. A person for whom counsel is appointed shall be represented at every stage of the proceedings from initial appearance before the magistrate-judge or the district court judge through appeal, including ancillary matters appropriate to the proceedings.

F. Appeal. In the event that a defendant enters a plea of guilty or is convicted following trial, appointed trial counsel shall advise the defendant of the right of appeal and of the right to counsel on appeal. If requested to do so by the defendant in a criminal case, counsel shall file a timely Notice of Appeal. Appointed trial counsel shall continue to represent the defendant on appeal unless or until relieved by the district court or the court of appeals.

G. Public and Private Counsel.

1. This plan provides for the furnishing of legal services by a Federal Public Defender Organization, supervised by a Federal Public Defender, serving the United States District Court for the Northern District of California. In addition, this plan provides for the appointment and compensation of private counsel in a substantial proportion of cases. The term "private counsel" includes counsel furnished by a state, local or non-profit defender organization, and a claim by such an entity for compensation will be approved on the same basis as in the case of the appointment of private counsel.

2. Insofar as practical, private attorneys will account for 25 percent of appointments made annually in the district under the Act.

II. FEDERAL PUBLIC DEFENDER ORGANIZATION

A. The Federal Public Defender Organization for the Northern District of California, previously established in this district under the Act, shall continue to operate pursuant to the provisions of subsection (g)(2)(A) of the Act, as well as the Guidelines for the Administration of the Criminal Justice Act (Volume VII, Guide to Judiciary Policies and Procedures), promulgated by the United States Judicial Conference pursuant to subsection (h) of the Act.

B. The Federal Public Defender shall furnish to this court a roster of staff attorneys and shall report any changes thereto to the court.

C. Upon determination that a person requires representation under the Act, a judge or magistrate-judge shall appoint the Federal Public Defender Organization. The Federal Public Defender will be responsible for the assignment of cases among the staff attorneys in that office. Accordingly, the court will appoint cases in the name of the Federal Public Defender Organization rather than in the name of individual staff attorneys.

D. If the Federal Public Defender cannot accept the appointment, the Court shall select a panel member according to the procedures set forth in section III.F. infra who is willing to undertake the representation of that person.

III. CRIMINAL JUSTICE ACT ADMINISTRATION

A. Criminal Justice Act Administration Committee. The Chief Judge of the District shall appoint members of a Criminal Justice Act (CJA) Administration Committee which will act for the District in administration of the Criminal Justice Act, and will establish, maintain and administer a panel of private attorneys for the San Francisco/Oakland divisions, a panel for the San Jose division, and a panel to handle appointments made by the Court of Appeals. The CJA

Administration Committee shall consist of three district judges, two magistrate-judges, three experienced criminal defense attorneys with prior panel experience, the Federal Public Defender and the Clerk of Court. The latter two members shall serve ex officio. There shall be a district judge member from each of the three divisions on the Court. There shall be an attorney member from each of the three divisions on the Court. The Chair of the CJA Administration Committee shall be selected by the Chief Judge of the District. In no event may an attorney for the government be a member of the CJA Administration Committee or of the Standing Committees on panel membership.

The Chair may appoint such sub-committees, both standing and ad hoc, as may be required to assist the CJA Administration Committee in its work. When it is appropriate according to the issue involved, the Chair may appoint any person considered to have the necessary expertise and qualifications, to ad hoc sub-committees.

There shall be standing sub-committees on panel membership for the San Francisco/Oakland divisions which shall select members for the San Francisco/Oakland Panel, and for the San Jose division which shall select members for the San Jose Panel. There shall be a standing appellate sub-committee which shall select members for the Appellate Panel.

The Panel Committees shall select panel members based on their

proven experience and competence in the field of criminal defense and their willingness to serve indigent defendants. At least annually, the Panel Committees shall review the operation and administration of their panels over the preceding year and recommend any changes deemed necessary or appropriate regarding the appointment process and panel management to the CJA Administration Committee. The Panel Committees shall also

inquire as to the continued availability and willingness of each panel member to accept appointments.

The CJA Administration Committee will promulgate regulations necessary to implement this Plan.

B. Types and Composition of Panels. The panels shall consist of private attorneys who are eligible and willing to be appointed in the district court or the court of appeals to provide representation under the Act. There shall be a single trial panel for the San Francisco/Oakland divisions of the court. All members of the San Francisco/Oakland Panel must be willing to take assignments in either venue. A separate trial panel shall be established for the San Jose division of the court. A separate panel to handle appointments in the Court of Appeals shall also be established.

The members of each panel will serve terms as set by regulations adopted by the CJA Administration Committee. A panel

member's term will continue until any representation for which counsel has been appointed has concluded even if the member's term has expired. Members of the panels shall serve at the pleasure of the Court. Any panel member may be removed from a panel pursuant to removal procedures adopted by the CJA Administration Committee.

C. Application for Panel Membership. Application forms for panel membership shall be made available, upon request, by the Federal Public Defender's Office. Completed applications shall be forwarded to the Office of the Federal Public Defender and shall be reviewed at least annually by the appropriate Panel Committee. Applicants must be members in good standing of the bar of this Court and of the State Bar of California and meet such qualifications, continuing education and other requirements as are set by the CJA Administration Committee.

D. Management of Panel. The Federal Public Defender shall maintain a current list of all attorneys included on the panels with current office addresses and telephone numbers. Every effort shall be made to ensure that counsel is appointed as expeditiously as possible.

The Court shall appoint panel members on a strict rotational basis, with the Federal Public Defender identifying the attorney next eligible and available to take a case. Exceptions to this rotational appointment may be allowed only when the representation

calls for a particular specialization or demand. The Federal Public Defender will keep a record of all such appointments for review by the CJA Administration Committee.

E. Appointment of Non-Panel Members To a Particular Case.

When the district judge or magistrate-judge presiding over the case, or the master calendar magistrate-judge if a district judge has not yet been assigned to the case, determines that the appointment of an attorney who is not a member of a panel, is in the interest of justice, judicial economy or continuing representation, the attorney may be appointed to represent a person qualifying under the Act. Consideration for preserving the integrity of the panel selection process suggests that such appointments should be made only in exceptional circumstances. Any attorney so appointed shall be subject to the provisions of this Plan.

F. Limited Representation Assignments. A separate panel rotation for material witness, Rule 40, probation, parole and supervised release violations and other limited representation assignments will be maintained. The same attorney who handled the underlying case will ordinarily be assigned the succeeding related case even if he or she is off the panel as of the time of the assignment.

IV. INVESTIGATIVE, EXPERT AND OTHER SERVICES

A. Upon Request. Counsel appointed under the Act may obtain investigative, expert and other services. Counsel not appointed under the Act may obtain such services for a person who is financially unable to obtain investigative, expert or other services necessary for adequate representation in his or her case. Such services may be requested through an ex parte application before a judge, or before a magistrate-judge if the services are required in connection with a matter over which the magistrate-judge has jurisdiction (or if the judge otherwise refers such application to a magistrate-judge for findings and report). Upon finding, after review of the application, or upon any further inquiry in an ex parte proceeding, held in camera, that the services are necessary, and that the person is financially unable to obtain them, the judge or the magistrate-judge, as the case may be, shall authorize counsel to obtain the services. The judge or magistrate-judge may establish a limit on the amount which may be expended or promised for such services. Claims for investigative, expert and other services rendered in cases handled by the Federal Public Defender Organization do not require court approval if they are paid from the Federal Public Defender Office budget.

B. Without Prior Request. Counsel, appointed under the Act may obtain, subject to later review, investigative, expert or other services without prior authorization, if necessary for adequate representation. Except as provided in the paragraph below, the total cost of services obtained without prior authorization, may not exceed \$300 and expenses reasonably incurred.

The judge or the magistrate-judge (if the services were rendered in a case disposed of entirely before the magistrate-judge), may, in the interest of justice and upon the finding that prior authorization could not reasonably have been obtained, approve payment of such services after they have been obtained, even if the cost of such services exceeds \$300.

A sworn application may be made by counsel to the judge or the magistrate-judge on the appropriate Criminal Justice Act form for the ex parte review by the Judge, or by a magistrate-judge if the services were rendered in a case disposed of entirely before the magistrate-judge.

C. Necessity of Declaration. The statement by or on behalf of the person in support of the request under Paragraph A and B supra, shall be made by declaration.

D. Quality of Services. The court, in all cases, will hold counsel accountable to obtain only qualified investigators or experts and to review the investigator's and expert's bills to assure that charges are accurate and reasonable.

V. COMPENSATION

Payment of fees and expenses to counsel appointed under this plan, and payment for investigative, expert and other services incurred pursuant to Title V hereof, shall be made in accordance with the provisions of the United States Judicial Conference's guidelines for the administration of the Act, in accordance with the fiscal policies of the Administrative Office of the United States Courts, and in accordance with the regulations promulgated pursuant to this Plan.

Claims for compensation of private attorneys and others furnishing services under the Act shall be submitted on the appropriate Criminal Justice Act form to the Clerk's Office. That office shall review the claim form for mathematical and technical accuracy and for conformity with the Guidelines for the Administration of the Criminal Justice Act (Volume VII, Guide to Judiciary Policies and Procedures) and the Criminal Justice Act Panel Attorney Manual for the United States District Court, Northern District of California, and if correct, shall forward the claim form

for the consideration of the appropriate judge or magistrate-judge.

VI. FORMS

Where standard forms have been approved by the Judicial Conference of the United States or an appropriate committee thereof, and have been distributed by the Administrative Office, such forms shall be used by the court, the clerk of the court, Federal Public Defender Organization, and other appointed counsel.

VII. GUIDELINES FOR THE ADMINISTRATION OF THE CRIMINAL JUSTICE ACT

The court, the clerk of the court, Federal Public Defender Organization, and private attorneys appointed under the Act and this plan, shall comply with the provisions of the Judicial Conference's Guidelines for the Administration of the Criminal Justice Act, (Vol. VII, Guide to Judiciary Policies and Procedures) and the Criminal Justice Act Panel Attorney Manual for the United States District Court, Northern District of California.

VIII. EFFECTIVE DATE

This plan shall take effect when approved by the judges of the Northern District of California and the Judicial Council of the Ninth Circuit.

For the Court on the 16th day
of November, 1999.

/S/ Marilyn Hall Patel
CHIEF JUDGE

Approved by the Judicial Council of
the Ninth Circuit on the 24th day
of February, 2000.*

/S/ Procter Hug, Jr.
CHIEF JUDGE

DATED: January 3, 1973

AMENDED: February 24, 2000*